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IN THE

Supreme Court of the United States

October Term, 1946
No. 889

VALCO MORTGAGE COMPANY, INC., JOHN WARREN and MARIE B. WARREN,

Petitioners,

against

536 BROAD STREET CORPORATION,

Respondent.

REPLY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO NEW JERSEY COURT OF ERRORS AND APPEALS

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REPLY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO NEW JERSEY COURT OF ERRORS AND APPEALS

Statement of Facts and Issues

In April 1933, the defendant, John Warren, a member of the Bar of New Jersey, became impoverished by his many financial manipulations and was forced into Bankruptcy. His liabilities were $295,000 and his assets, substantially "nil". His connections with the complainant corporation, prior to the year mentioned, resulted in his becoming a stockholder, director, treasurer, attorney, and absolute manager of the company.

Knowing that one, Tillie O. Barnet, held a mortgage, upon the property of the complainant, known as 536 Broad Street, Newark, New Jersey, in the sum of $150,000 which

mortgage could be bought for $55,000 said Warren, by stealth, determined to become possessed of it, and, to further his aim, at a meeting of the corporation in January 1934, announced that he was leaving the company (although he continued to act as its attorney), and was going on a long business trip (which he did not do), and thereafter resume his practice which had meanwhile substantially disappeared. We here insist that Warren, once attorney for complainant, could not disrobe himself as such, until and unless he satisfied the Court that he actually resigned as such attorney.

Dunn v. *Dunn*, 42 N. J. Equity, p. 41;
Schenck v. *Davis*, 134 N. J. Equity, p. 375.

Feeling secure in his action as above stated, he with the assistance of a money lender, borrowed from him $35,000 on a note due in thirty days which was paid, with interest (not known or disclosed) in twenty days from its date, by complainant.

The testimony given by Warren, recited statements alleged to have been made by Fred Barnet, sometime before his death in 1939, which was about three years before the instant suit was brought. Warren, in the early part of 1934, in the name of "Valco Mortgage Co." (a dummy corporation organized in secret at his behest) began making demands upon the complainant corporation, for large sums of money in reduction of said mortgage, so that at the time of the decree of Vice Chancellor Kays, he had collected the sum of $55,000 plus about $49,000. The payment of $35,000 and interest above mentioned was paid at a meeting of complainant corporation on March 19, 1934 upon demand of

Warren (in the name of Valco), under threats of foreclosure. No one knew that the "Valco" corporation was "Warren" in disguise, as his name was no where disclosed in corporate records filed in the Secretary of State's office or elsewhere, nor did Warren ever tell Fred Barnet or anyone until 1942 (after the instant suit was brought). In said year, Advisory Master Stanton, Warren's former legal ascoiate, read of it, the suit, in the public press and shortly thereafter was visited by Warren for the purpose of obtaining his help. Advisory Master Stanton, an upright man, in high esteem, at the trial took the stand and testified that he, although Secretary of the corporation, at the time above stated, was not informed, nor did the minutes of that meeting disclose or mention, that the mortgage had ever been offered to the complainant company for $55,000 or any other price.

Suppression by Warren

1. Suppression by Warren from Mrs. Fred M. Barnet. July 23, 1938 (Ex. C. 44).

2. Suppression from Charles B. Collins, connected with a large firm of Jersey City, N. J. who testified that on January 20, 1939 Warren admitted to him that "Valco is now a holding company for his wife, Marie B. Warren" (R. 863).

3. Suppression by Warren from Fred Barnet as to the identity of Valco March 6, 1935 (Ex. C. 35).

4. Warren testified, in the cause in 1943, that "Valco is Warren and Warren is Valco" (R. 153).

5. Warren further suppressed the true identity of "Valco" when, in 1943, Stanton asked him who "Valco" was and the latter was informed that "It was a company formed by Frank Meehan" (an attorney in Newark) (R. 202, 203, 204).

An important feature in this case is, that at the time that the said $35,000 and interest was paid by complainant to Valco, it had in its treasury quick assets (money and good securities totalling $73,510.57) (Ex. C. 44, R. 202), with which it could easily have purchased the said mortgage, and have about (or over) $17,000 in its treasury, and could save $9,000 per year on interest—at six per cent—upon the said mortgage of $150,000 (Ex. C. 4, R. 2002).

Warren's Hunger for Money

As early as August 6, 1934, after Warren had collected from complainant, corporation, a considerable sum of money, he personally and without knowledge of complainant, made applications for money loans, the proceeds of which were for "Valco", from a number of persons and corporations (Ex. D. 12, R. 144, 147, 150, 152, 161).

One of the loans was requested from the Prudential Life Insurance Company of Newark, New Jersey on June 11, 1936. In said application he wrote, *inter-alia*, that he (Fred Barnet) "was my client in the aforesaid litigation (referring to the Tillie O. Barnet will contest in 1927), and it is my desire "to refinance" this property so as to provide him (Barnet), with a small income. This he never did. But Warren realized at the time that he wrote the letter, in question, that Barnet was suffering from dire poverty.

Such was virtually the end of the once wealthy Barnet, the close friend of Warren, who was collecting large sums of money from complainant, leaving his friend actually "out in the cold".

After the many applications referred to, Warren, on September 16, 1936, obtained a loan from the Guardian Life Insurance Company of New York City, in the sum of $50,000 (Warren was attorney for said company). Out of the proceeds of said sum, there was paid, as follows:

To Gibraltar Bonds, a corporation, in payment to it for certain bonds which "Valco" bought from that company	$15,845
To "Valco"	11,500
To National State Bank of Newark, in reduction of "Valco" liabilities	4,719
To National State Bank of Newark—payment of three notes for same purpose	1,500
	$33,564

Other monies were paid to Warren by Complainant ($3,616.37) for services (Ex. C. 4).

Re: Alleged Agreement Between Fred Barnet and John Warren, Relating to Certain Work, Which He, Warren, Was to Perform for Complainant

The said agreement was never carried out, in fact, we do not find any agreement to exist whatsoever. Warren was depending upon Vincent Belfatto, president of complainant corporation to do considerable work for said corporation.

The following exhibits refer to letters written by said Belfatto and show that Warren was depending greatly upon him (Ex. D. 197—February 7, 1941, Ex. D. 203—May 8, 1941, Ex. D. 204—May 14, 1941, Ex. D. 207—June 5, 1941, Ex. D. 208—June 14, 1941, Ex. D. 219—February 25, 1943).

Lost Books

No books or records were kept by Warren for Valco (R. 108).

Nothing in Writing

Nothing in writing was found with respect to the "deal" between Warren and the "money lender".

Lost Books

Warren side-stepped a question asked him by this counsel, if any books of "Valco" were in his possession (R. 974).

When asked about the books of "Valco", he, having had a large safe in his office with all books, answered, "There is no book of the corporation" meaning Valco (R. 981).

Being questioned as to whether any search was made for any books, he said that he could find no books. "I looked through packing cases that were in storage" etc. (R. 976).

Re: Minutes of the Corporation (Complainant)

Warren said (R. 1081) * * * "that no minutes of the meetings of the complainant will be found where there is any reference to the mortgage ($150,000) being offered for sale for $55,000 or any other price."

Rule in New Jersey Relating to Fiduciaries

Redmond v. *Dickerson,* 9 N. J. E. 507;
Condit v. *Blackwell,* 22 N. J. E., p. 481;
Brown v. *Bulkley,* 14 N. J. E., p. 451;
Porter v. *Woodruff,* 36 N. J. E., p. 174;
Masholie v. *River Edge Estates,* 129 N. J. E., p. 228,
Sun B. & L. Ass'n v. *Rashkes,* 119 N. J. E., p. 443;
Keeley, et al. v. *Black, et al.,* 90 N. J. E., p. 439.

No Authority in Barnet to Act as Agent or Manager for Complainant Corporation

Beers v. *Broad & Market Nat'l Bank,* 102 N. J. L., pp. 5-107, N. J. L., p. 372;
Knopf v. *Alma Park,* 105 N. J. E., p. 299, aff'd 107 N. J. E., p. 140;
Myrtle Ave. Corp. v. *Prospect B. & L. Ass'n,* 112 N. J. L., p. 60.

Alleged Agreement Between Warren and Fred Barnet Is Uncertain and Lacks Power of Enforcement

Prof. Williston on Contracts, 1936 Ed., Vol. 1, p. 138, par. 49;
McElroy v. *Lundlum,* 32 N. J. E. 828;
Greenfield v. *Carey,* 70 N. J. L., p. 613;
Barns v. *P. & D. Manufacturing Co.,* 117 N. J. L., p. 156.

No Laches, Estoppel, or Acquiescence Where Fraud Exists

Carlisle v. *Cooper,* 18 N. J. E., p. 241;
Turner v. *Kuehnle,* 70 N. J. E., p. 61;
Turnley v. *Nixon,* 112 N. J. E., p. 116;
Scheel v. *Jacobson,* 112 N. J. E., p. 265;
Hall v. *Otterson,* 52 N. J. E., p. 522;
Geirach v. *Rupp,* 112 N. J. E., p. 296.

Re: Credibility of Witnesses' Rule in New Jersey

Attempt is made by petitioners to discredit the Decree of the Court of Chancery for the reason that the Court should not have discredited the testimony of defendant's witnesses. As to this we cite the following opinions by our Courts to wit:

In *Daggers* v. *Vandyck,* 37 N. J. Equity 130, bottom pp. 132-133, Vice Chancellor Van Fleet wrote a masterful opinion in which he said, *inter alia,*

"Evidence to be believed must not only proceed from the mouth of a credible witness, but it must be

> credible in itself, such as the common experience and observations of mankind can approve as possible under the circumstances * * *. Evidence is generally considered improbable, when it imports, to the parties to a transaction, occurring in the ordinary course of business, conduct inconsistent with the principles by which, men, similarly situated are usually governed. Citing *Gilson* v. *Gilson,* 116 N. J. Equity 556 at page 560.

In *Riehl* v. *Riehl,* 101 N. J. Equity 15, Opinion by Chancellor Walker, he wrote (page 22),

> "The trier of facts is the judge of the credibility of witness and does not have to believe a particular witness or witnesses. A witness is not entitled to credit those testimony is inconsistent with the principles by which the conduct of mankind is naturally governed," citing *Clark* v. *P. S. etc.,* 86 N. J. Law 144. See also *Selinger* v. *Selinger,* 115 N. J. Equity page 261, *Meyer* v. *Blacher,* 120 N. J. Equity 35.

In making his rulings, respecting credibility of witnesses, we ask whether Vice Chancellor Kays was in error, when he said,

> "It is unbelievable that Fred M. Barnet was so stupid that he refused to purchase the mortgage" R. I. 81. ($150,000 for $55,000) (R. 1-81).

Could the learned Vice Chancellor find other than he did, keeping in mind the characterization, given by Warren and his witnesses, to the learning, ability and care of said Barnet.

Argument

An unpleasant observation concerns the libelous statements by Warren in his petition (pp. 4, 15, 19, 20, 22) which are referred to, in the opinions of former Chancellor Luther A. Campbell in

> *536 Broad Street Corporation* v. *Valco Mortgage Co.*, 133 N. J. E. page 240. In *same v. same*, Opinion Justice Parker, 134 N. J. E. 224; 135 N. J. E. 361, Opinion by Vice Chancellor leading to a decree by the Court of Chancery. This opinion is so vital and so completely covers the case that we ask this court to read the same in its entirety.
>
> In *same v. same*, 135 N. J. E. 581, Challenge, to have the Vice Chancellor recuse himself.
>
> In *same v. same*, 136 N. J. E. 513, Opinion by Court of Errors and Appeals, agreeing with said Vice Chancellor in refusing to disqualify the learned Vice Chancellor.
>
> The entire case has been closed by the rendition by the Court of Errors and Appeals of New Jersey affirming the decree of the Court of Chancery on June 27, 1946 this appears in N. J. E. 138, 431.
>
> We next discuss further allegations in petitioners' petition which involve scandalous and ludicrous caricatures. Petition, pp. 47-47a.

No one can view the "vulture" and the "closed fist" as well as reading the numerous unfriendly newspaper clippings, attached to defendants' petition, without realizing that the petitioners have taken an attitude so unfriendly toward, not only our Vice Chancellor Kays, but to our Court of Chancery, the tendency of which is to destroy the repu-

tation of our distinguished court and the other courts which constitute the judicial structure of the State of New Jersey.

Under the Rules and Orders of this Honorable Court we feel, that such scandalous allegations and caricatures are beneath the dignity of this Honorable Court and should be strongly condemned.

Re: Jurisdiction of This Court

It is very difficult to discuss the value of a "vacuum" and by analogy, discuss non-existent facts, after our extensive examination of the record, containing over 2600 pages, and our recollections thereof. We are unable to find that there has been a single violation of the Fourteenth Amendment of the United States Constitution, or of any article thereof, resulting from either wilful intention, carelessness or ignorance. On the contrary, the record of the hearing conducted by the Honorable Vice Chancellor Henry T. Kays will show conscientiousness and a most careful consideration of the intricate matters involved in this cause.

Discussion of the Law as Enunciated by the Supreme Court of the United States

> "Petitions for writs of certiorari * * * should be carefully prepared, contain appropriate references to the record and present, with studied accuracy, brevity and clearness whatever is essential to ready and adequate understanding of points requiring the Court's attention. When the real situation is not set forth, by the petition, a duty rests on the opposing counsel to reveal it in their reply."

Furness Withy v. *Yang Tsze Insurance Assn.*, 242 U. S. 430;
U. S. v. *Rimer*, 220 U. S. 547.

In *Layne, etc.* v. *Western Well Works*, 261 U. S. 387, 392, Chief Justice Taft said,

> "In dismissing the application for a writ of certiorari, • • • it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles, the settlement of which is important to the public as distinguished from the parties, and in cases where there is a real conflicting of opinion between the Circuit Courts of Appeal."

In *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508, opinion per Justice McReynolds, who pointed out the necessity for clear, definite and complete disclosures when applying for certiorari. Citing *Furness Withy, et al.* v. *Yang Tsze, etc.*, 242 U. S. 430 and *Layne, etc.* v. *Western Well Co.*, 261 U. S. 387.

Farrell v. *O'Brien*, 199 U. S. 89, Justice White wrote at page 100,

> "It is settled that the mere averment of a constitutional question is not sufficient where the question sought to be reviewed is so wanting in merit as to cause it to be frivolous or without any support whatsoever in reason."

In *Magnum Import* v. *Coty*, 262 U. S. 159, 163, on page 163, Chief Justice Taft said,

> "The jurisdiction to bring up cases by certiorari • • • was given for two purposes, first to secure uni-

formity of decision between these Courts (referring to Circuit Courts of Appeal) and second, to bring up cases involving questions of importance * * *.

"The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."

In *Fayerweather* v. *Ritch*, 195 U. S. 276, 299, opinion by Justice Brewer,

"The mere assertion by plaintiff of constitutional questions or that they have been deprived of their property without due process does not establish jurisdiction."

Citing:

Newbury Water Co. v. *Newbury Port*, 193 U. S. 561;
New Orleans Water Co. v. *Louisiana*, 185 U. S. 336;
Maynard v. *Hecht*, 151 U. S. 324.

In *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440, Justice McReynolds said,

"The propriety of submitting these matters depended essentially upon an appreciation of the evidence. Having heard it all, the trial court concluded that there was not enough in support of any one of the petitioner's above stated claims to warrant a finding in their favor and the Circuit Court of Appeals reached the same result."

Impertinent and improper matter in a petition for a Writ of Certiorari and the accompanying brief will be stricken from the file. *Yellow Poplar Lumber Co.* v. *Chapman*, 215 U. S. 601.

CONCLUSION

No question of Federal Law is herein presented as warrants the granting of a writ of certiorari, and we therefore urge that petitioners' petition should be dismissed.

Respectfully submitted,

BENJAMIN M. WEINBERG,
Counsel for Respondent.